THOR LYE SUAN v. CHUA SIEW KEE (CAI XIUQI) & ORS

HIGH COURT MALAYA, JOHOR BAHRU
CHOO KAH SING JC
[SUIT NO: JA-22NCVC-205-10-2016]
21 AUGUST 2017

COMPANY LAW: *Derivative action – Locus standi – Pre-requisite in bringing common law derivative action – Action by widow for estate of deceased – Letter of administration not extracted upon obtaining order for administration of estate – Whether widow clothed with representative character – Whether there were 'special circumstances' to avail widow with locus standi*

The plaintiff was the lawful wife of Tey Chai Bak, the deceased, who held 21.2% shareholding in the fifth defendant company. The first to fourth defendants were the directors and shareholders of the fifth defendant company. The plaintiff, being a Singapore citizen and being the lawful widow of Tey Chai Bak, obtained a Singapore court order for the administration of the estate of the late Tey Chai Bak. However, the plaintiff had not extracted the grant of letter of administration. The plaintiff filed the present suit (i) in her personal capacity and on behalf of the beneficiaries of the estate of Tey Chai Bak; and (ii) for and on behalf of the shareholders and the members of the fifth defendant company, excluding the first, second and third defendants. The plaintiff's action was premised on a common law derivative action. The complaints of the plaintiff against the defendants were, *inter alia*, that the first to fourth defendants had disposed of several assets of the fifth defendant company, after the demise of Tey Chai Bak, without complying with the requisite provisions of the Companies Act 1965. The assets were allegedly disposed of grossly undervalued. There were three applications herein. Enclosure 4 was an application by the plaintiff for an injunction to prevent the defendants from disposing the properties belonging to the fifth defendant company. The court granted an *ex parte* interim order. *Vide* encl. 41, the defendants sought to set aside the interim order, whilst, by encl. 58, the defendants sought to strike out the plaintiff's suit pursuant to O. 18 r. 19(1)(a) and/or (b) or (c) or (d) of the Rules of Court 2012.

Held (allowing encls. 41 & 58; striking out encl. 4):

(1) It is trite law in Malaysia that an executor or administrator of an estate of a deceased could only legally act on behalf of the estate of the deceased upon he/she being granted a grant of probate or letter of administration, whichever is applicable, by a competent court of law. Only on the extraction of a grant of letter of administration would the plaintiff be duly clothed with a representative character and have the *locus standi* to bring this action. However, if there are 'special

circumstances', the administrator will have *locus* to proceed with the legal proceedings. The plaintiff did not bring the action in the capacity as an administrator, but as a beneficiary and on behalf of other beneficiaries as well. In the circumstances, the 'special circumstance' which could avail her *locus standi* to initiate the legal proceedings was not applicable. (paras 12, 15, 16, & 18)

(2) Although the plaintiff had asserted in the intitulement that she represented herself and the rest of the beneficiaries in this action, the rest of the beneficiaries affirmed affidavits respectively and had stated otherwise. None of them gave the plaintiff the power, authority or consent to institute the action on their behalf. The plaintiff had also claimed that she represented herself as the shareholder on behalf of other shareholders and members of the fifth defendant company and therefore, in essence, she had brought a common law derivative action against the defendant. However, the plaintiff had not satisfied the pre-requisite of bringing the common law derivative action, that is, the plaintiff must first satisfy the court that he/she has the *locus standi* to come before the court for a remedy. (paras 21, 23 & 24)

(3) The actions brought by the plaintiff were also contradictory. On one hand, the plaintiff's intent was to protect the assets of the fifth defendant company and on the other hand, the plaintiff intended to wind up the fifth defendant company, which is totally against the principle of a common law derivative action. Clearly, such actions taken by the plaintiff amounted to an abuse of the court process. In the circumstances, the defendants' application in encls. 58 and 41 were allowed. The plaintiff's *inter-partes* injunction application could not be sustained after the main suit had been struck out and hence, encl. 4 was dismissed. (paras 29, 30 & 31)

Case(s) referred to:

Binney v. Ince Hall Coal and Cannel Co [1866] 35 LJ Ch 363 ***(refd)***

Bruno Phillipe Fehrenbach v. Pegawai Penerima, Malaysia [1999] 6 CLJ 177 HC ***(dist)***

Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman & Ors [2014] 5 CLJ 669 CA ***(refd)***

Jigarlal Kantilal Doshi v. Amanah Raya Bhd [2011] 9 CLJ 361 FC ***(refd)***

Law Hock Key & Anor v. Yap Meng Kan & Ors [2008] 3 CLJ 470 CA ***(refd)***

Prudential Assurance Co Ltd v. Newman Industries (No 2) [1982] Ch 204 ***(refd)***

Tacplas Property Services Pte Ltd v. Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased) [2000] 1 SLR (R) 159 ***(refd)***

Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah [1979] 1 LNS 130 FC ***(refd)***

For the plaintiff - Adi Radlan & Mohd Faizal; M/s Adi Radlan & Co
For the defendants - Annou Xavier; M/s Azri, Lee Swee Seng & Co

Reported by S Barathi

JUDGMENT

Choo Kah Sing JC:

Introduction

[1] There are three applications, namely, encl. 4 which was filed by the plaintiff, and encls. 41 and 58 which were filed by the defendants.

[2] Enclosure 4, in essence, is an application by the plaintiff for an injunction to prevent the defendants from disposing several properties in Johore Bahru. These properties belong to the fifth defendant company. The first, second, third and fourth defendants are the directors and shareholders (except fourth defendant) of the fifth defendant company. The plaintiff also sought for an injunction to prevent the first to fourth defendants from utilizing a sum of RM650,000 and the proceeds of sales of several properties worth approximately RM3 million which are believed to be in the custody of the fifth defendant company. The plaintiff prayed for the injunction orders to stand until after the determination of the trial of this action.

[3] An *ex parte* interim order was granted by this court on 7 November 2016. The terms of the *ex parte* interim order were later varied on 16 November 2016. An *inter parte* hearing was then fixed before this court for encl. 4.

[4] Before encl. 4 could be disposed by this court, the defendants filed two applications. The first application is encl. 41. Enclosure 41 sought for an order to set aside the interim order dated 7 November 2016 and/or 16 November 2016. The second application is encl. 58. Enclosure 58 sought for an order to strike out the entire plaintiff's suit pursuant to O. 18 rr. 19(1)(a) and/or (b) or (c) or (d) of the Rules of Court 2012.

[5] This court directed all the enclosures to be heard together, and that encl. 58 to be determined first. In the event the defendants succeed in striking out the plaintiff's suit, then appropriate orders will be given for encls. 4 and 41. In the event the defendants' encl. 58 fails, then this court shall proceed to deliver its decision for encls. 4 and 41 as well.

[6] On 2 July 2017, this court delivered its decision. This court allowed the defendants' striking out application. The court then followed with the decision that encl. 4 be dismissed and encl. 41 be allowed. The reasons for the decisions of this court are set down as below.

Background Facts

[7] The plaintiff is the lawful wife of Tey Chai Bak who passed away on 27 May 2015. When Tey Chai Bak was alive, he held 21.2% shareholding in the fifth defendant company. The first, second and third defendants held approximately 10%, 8.7% and 50.74% shareholdings respectively in the fifth defendant company.

[8] The plaintiff, being a Singapore citizen and being the lawful widow of Tey Chai Bak, obtained a Singapore Court Order to be the joint-administrator with one Audrey (daughter of the deceased from his first marriage) for the administration of the estate of the late Tey Chai Bak. However, the plaintiff has not extracted the grant of letter of administration until today.

[9] The plaintiff, through her solicitors in Malaysia, filed this suit in these capacities as (i) in her personal capacity and on behalf of the beneficiaries of the estate of Tey Chai Bak, and (ii) for and on behalf of shareholder(s) and member(s) of the fifth defendant company, excluding the first, second and third defendants.

[10] The plaintiff's action is premised on a common law derivative action which simply means an action is brought by a shareholder of the fifth defendant company in the name of and on behalf of the fifth defendant company in respect of the purported wrong committed to the fifth defendant company by the first, second, third and fourth defendants as shareholders and director of the said company.

[11] The complaints of the plaintiff against the defendants were, *inter alia*, that the first, second, third and fourth defendants had disposed several assets of the fifth defendant company without complying with the requisite provisions of the Companies Act 1965. The disposal of the said properties were done after the demise of Tey Chai Bak. Further, the disposal of the fifth defendant company's assets by the said defendants were done with suspicion, because the properties were disposed-off grossly undervalued, the plaintiff claimed.

The Finding Of This Court

[12] It is trite law in Malaysia that an executor or administrator of an estate of a deceased could only legally act on behalf of the estate of the deceased upon he/she being granted a grant of probate or letter of administration, whichever is applicable, by a competent court of law.

[13] In *Jigarlal Kantilal Doshi v. Amanah Raya Bhd* [2011] 9 CLJ 361, p. 373, the Federal Court held as follows:

> It is the grant that clothes the personal representative with a title upon its issue by the Registry under the seal of court. The administrator derives his title from the grant and cannot act until then. We agree with what Ismail Khan J said in *P Govindasamay Pillay & Sons Ltd v. Lok Seng Chai & Ors* [1961] 1 LNS 78 that "it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with the representative character and to have acquired a title to the estate". The learned judge in that case also followed Lord Parker's observation in the case of *SMKR Meyappa Chetty v. SN Supramaniam Chetty* [1957] 1 WLR 157, that:
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> > An Administrator on the other hand derives title solely under his grant and cannot, therefore, institute an action as administrator before he gets his grant. The law on the point is well settled.

[14] In *Dato' Ramesh Rajaratnam v. Datin Zaleha Abd Rahman* [2014] 5 CLJ 669; [2014] 6 MLJ 651, p. 676 (CLJ); p. 657 (MLJ), wherein the Court of Appeal held as follows: A

> Malaysian courts have repeatedly given recognition to the rule that an administrator must have the sealed order of the High Court before getting entangled in any legal proceedings in court … B

[15] However, there are exceptions to the general rule as stated above. The Court of Appeal in the aforementioned case held at p. 673 (CLJ); p. 654 (MLJ) as follows:

> … The strict rule recently had been whittled down by the Federal Court to say if there are 'special circumstances' the administrator will have locus to proceed with the legal proceedings (see *Al Rashidy bin Kassim & Ors v. Rosman bin Roslan* [2007] 4 MLJ 297; [2007] 3 CLJ 361). This is notwithstanding the strict provision of s. 39(1) of the Probate and Administration Act 1959 … C

[16] In the present case, the plaintiff did not bring this action in the capacity as an administrator, but as a beneficiary and on behalf of other beneficiaries as well. In these circumstances, the 'special circumstance' which could avail her the *locus standi* to initiate this legal proceedings was not applicable. D

[17] In *Law Hock Key & Anor v. Yap Meng Kan & Ors* [2008] 3 CLJ 470, p. 487, wherein the Court of Appeal held as follows: E

> … We are of the view that as the plaintiffs are claiming their deceased mother's right in the estate of her father Low Moh, deceased, the plaintiffs have to obtain the letters of administration in respect of the estate of their mother in order to entitle them to bring this action against the defendants. They have to establish that they have legal title to sue the defendants. They are the beneficiaries of their mother's estate but they are not the legal representatives of the estate as they had not applied for the letter of administration in respect of their mother's estate. As such, they have no *locus standi* to bring this action against the defendants. This issue has been decided by the Federal Court in *Deraman & Ors v. Mek Yam* [1976] 1 LNS 20 … F G

[18] The above legal propositions of the higher courts are crystal clear in that only on the extraction of a grant of letter of administration would the plaintiff could be said to be duly clothed with a representative character and have the *locus standi* to bring this action. H

[19] Counsel for the defendants brought to the attention of this court a decision by the Singapore Court of Appeal in *Tacplas Property Services Pte Ltd v. Lee Peter Michael (administrator of the estate of Lee Ching Miow, deceased)* [2000] 1 SLR (R) 159, p. 171, wherein it held: I

A Accordingly, we hold that administrators of an estate must act jointly and the act of one administrator cannot bind the estate, unless that act is ratified by all the administrators.

[20] In the absence of any proof of rectification by the other administrator on record, the plaintiff's *locus standi* in initiating this action is questionable.

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[21] Counsel for the defendants submitted that the plaintiff asserts in the intitulement that she represents herself and the rest of the beneficiaries in this action. Ironically, the rest of the beneficiaries affirmed affidavits respectively and have stated otherwise. None of them gave the plaintiff the power, authority or consent to institute this action on their behalf.

C

[22] If the plaintiff did not bring this action as an administrator or on behalf of the other beneficiaries, what then was her capacity as a plaintiff?

[23] In the intitulement, the plaintiff also claims that she represents herself as the shareholder and on behalf of other shareholders and members of the D fifth defendant company. In essence, she has brought a common law derivative action against the defendants. A derivative action is an action brought by a shareholder (normally minority shareholder) or director of a company in the name of and on behalf of that company in respect of a wrong committed to the said company.

E **[24]** The plaintiff has submitted at length orally and in writing on the common law derivative action which this court fully comprehends and appreciates. This court fully agreed that the purported facts alleged in the various plaintiff's affidavits as well as in the pleadings are sufficient to form a case and cause of action against the defendants. However, this court was F not satisfied that the plaintiff has fulfilled the prerequisite of bringing this common law derivation action. The pre-requisite of initiating a derivative action is that the plaintiff must first satisfy the court that he/she has the *locus standi* to come before the court for a remedy (see *Prudential Assurance Co Ltd v. Newman Industries (No. 2)* [1982] Ch 204).

G **[25]** The plaintiff submitted that the plaintiff has an 'equitable interest' as a beneficiary in the estate of Tey Chai Bak, deceased. The plaintiff's legal standing in bringing this suit, therefore, derives from her 'equitable interest', ie, in the shares of Tey Chai Bak, deceased, counsel argued.

[26] The plaintiff relied on a High Court decision in *Bruno Phillipe* H *Fehrenbach v. Pegawai Penerima, Malaysia* [1999] 6 CLJ 177; [1999] 2 AMR 1339. The facts in that case is distinguishable from the facts of this present case. The facts in that case was that the plaintiff was a minority shareholder in the company, whereas, in the present case, the plaintiff is not even a shareholder in the fifth defendant company nor she has obtained any legal I right as an administrator, as discussed above.

[27] Counsel also cited the Federal Court decision in *Yeng Hing Enterprise Sdn Bhd v. Liow Su Fah* [1979] 1 LNS 130; [1979] 2 MLJ 240 which referred to an old English authority *Binney v. Ince Hall Coal and Cannel Co* [1866] 35 LJ Ch 363 which concerns an equitable mortgagee having the legal standing to sue the company by way of a derivative action. This court, after perusing the authorities cited, found the intention of the applicants in those authorities was to protect the interest of the company concerned.

[28] In the present case, the plaintiff has relied on an equitable common law derivative action by claiming to have an 'equitable interest' in the fifth defendant company, and the plaintiff is seeking this court to recognise her legal standing based on equitable principle. Ironically, the plaintiff has also filed a winding-up proceeding against the fifth defendant company in a separate court *via* suit no. JA-28 NCC-49-03-2017.

[29] The actions brought by the plaintiff are in contradiction. On one hand, the plaintiff's intent was to protect the assets of the fifth defendant company in this action; on the other hand, the plaintiff (it is not known in what capacity) intends to wind-up the fifth defendant company, which is totally against the principle of a common law derivative action. The juxtaposition created by the plaintiff is frowned upon by this court. Clearly, such actions taken by the plaintiff amounts to an abuse of court process. Hence, this court is not satisfied that the plaintiff has a legal standing to bring this equitable common law derivative action.

Conclusion

[30] Based on the above, this court allowed the defendants' application in striking out the plaintiff's action on the ground that the plaintiff did not have any *locus standi* in filing this action, and further, the plaintiff had perpetrated an abuse of court process by filing two legal actions having opposing claims in nature, and therefore, the plaintiff's action must fail. The court ordered costs of RM15,000 to the defendants for encl. 58.

[31] Flowing from the decision in encl. 58, this court also allowed the defendants' application to set aside the interim order dated 7 November 2016 and/or 16 November 2016 (encl. 41), and ordered damages to be assessed before the Deputy Registrar. Further, encl. 4, the plaintiff's *inter parte* injunction application, could not be sustained after the main suit has been struck out. Hence, this court dismissed encl. 4 and ordered costs of RM15,000 to be paid to the defendants by the plaintiff.